

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: November 23, 2004

TO : Wayne Gold, Regional Director
Region 5

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Local 669 Joint Apprenticeship and Training Committee
5-CA-31727

506-6050-6210
506-6090-1900
512-5060-0800
512-5060-4400
512-5060-5000
512-5042-0100
548-6030-6725-0100

This Section 8(a)(1) case was submitted for advice concerning whether the Joint Apprenticeship and Training Committee (JATC) acted unlawfully when it (1) required apprenticeship applicants to agree as a condition of accepting a scholarship loan that they would not work for an employer involved in a strike with an affiliated local; and (2) refused to accept SimplexGrinnell applicants into the apprenticeship program because they chose not to participate in a strike against SimplexGrinnell.

We conclude that the JATC unlawfully (1) required applicants to agree as a condition of accepting a scholarship loan that they would not work for an employer involved in a strike with an affiliated local because the JATC thereby conditioned the scholarship upon a broad waiver of the Section 7 right to refrain from striking; and (2) refused to accept nonstriking applicants into the apprenticeship program because the JATC thereby discriminated against applicants because of their Section 7 protected refusal to strike. However, an additional allegation, that the JATC failed to move the SimplexGrinnell apprentices through the program because they had exercised their Section 7 right to refrain from striking, should be dismissed because the evidence demonstrates that the JATC, in fact, did allow these apprentices to progress through the program.¹

¹ The Region has concluded that the JATC also unlawfully refused to convert SimplexGrinnell apprentices to temporary

FACTSThe Apprenticeship Program and Scholarship Loan Agreement

Road Sprinkler Fitters Local 669 (Local 669 or the Union) represents individuals employed in the sprinkler fitting industry. Local 669 and the National Fire Sprinkler Association (NFSA), a multi-employer association, are parties to a series of collective-bargaining agreements. The parties also negotiated the Industry Education Fund Trust Agreement to support and maintain an ERISA-covered sprinkler fitter apprenticeship program. The Trust Agreement provided for a Board of Trustees to administer the Trust and operate the Education Fund. The Board of Trustees delegated its authority to operate the apprenticeship program to the JATC, which consists of an equal number of representatives of labor and management.

The details of the program, including the JATC's functions, are set forth in the negotiated "Apprenticeship Standards" document appended to the parties' collective-bargaining agreements.² These Standards, approved by the U.S. Department of Labor contain the following pertinent provisions:

Duties of the Joint Apprenticeship and Training Committee

- (a) To determine the need for Apprentices.
- (b) To determine the adequacy of an employer to give proper training.
- (c) To place Apprentices under written Apprenticeship Agreements

journeyman status because they were not members in good standing of the Union. That matter has not been submitted for advice. It would appear from the JATC's October 29, 2003 letter to Simplex Grinnell that the JATC's refusal to promote apprentices to temporary journeyman status was also based upon the apprentices' refusal to participate in the strike. In that event, the JATC has violated Section 8(a)(1) on that additional basis.

² The apprenticeship program includes over 3,500 apprentices nationwide.

(e) To approve Apprenticeship Agreements

(n) To ensure that training resources are expended so that they may help to serve the need for skilled labor of employers supporting this program and to ensure continued financial support for this program by, among other things, requiring reimbursement of all costs incurred by the JATC and/or the . . . Education fund on behalf of individual Apprentices who choose to work in employment not covered by a collective bargaining agreement requiring payments in support of this or a similar program.

Supervision of Apprentices

(a) During the entire term of Apprenticeship, the apprentices shall be under the jurisdiction and control of the Joint Apprenticeship and Training Committee, and the Committee shall have the authority to protect their welfare and also to instruct, direct and discipline at all times. . . .

Hiring of Apprentices

Employers being entitled to and desiring an Apprentice shall make application for said Apprentice to the Joint Committee

Adjusting Differences

The Committee shall undertake to keep the Apprentice at work at the trade continuously, except in case of strike, lockout, sickness or other unavoidable causes, unsatisfactory completion of related training courses, or by action of the Joint Committee.

Work Experience

. . . . Where it is found impossible for one Employer to provide the diversity of experience necessary to give the Apprentice all-around training in the trade, the Joint Apprenticeship and Training Committee may transfer the Apprentice temporarily or permanently, to another Employer, in which case the Employer to whom the Apprentice is assigned will assume all obligations of the original Employer, but in no case shall an Apprentice be transferred to a shop where there is a labor dispute.

The Standards provide that potential apprentices apply to, and are selected by, the JATC. In practice, however,

individuals apply to the employers who then forward their applications for processing by the JATC. The applications provide a space for the sponsoring company's name and address. The employers sometimes hire the applicants before submitting their applications to the JATC.

In fulfillment of its duties to "ensure continued financial support" for the program, the JATC requires apprentice applicants, as a condition of entering the program, to sign a Scholarship Loan Agreement and Promissory Note covering the cost of training. The Loan Agreement provides in relevant part:

Repayment: The Apprentice agrees to repay the Scholarship Loan in full. . . . either in cash . . . or by in-kind credits

Repayment by In-Kind Credits: An apprentice who works after completion of or Withdrawal from the Training Program, pursuant to a collective bargaining agreement for an Employer making payments to the Fund or a like Joint Apprenticeship Fund or Training Fund, will receive a credit for each calendar year of such employment in accordance with the Repayment Schedule

Warranty of the Apprentice: The Apprentice agrees and warrants *that as a further condition of receiving the Scholarship Loan, he will neither seek, continue, nor accept employment from an employer involved in a strike with a local affiliated with the [Union] [emphasis added].*

Breach of this Agreement: It will constitute an immediate breach of this Agreement if the Apprentice . . . *is employed by, continues employment with, or becomes an employer against which any affiliated local union of the United Association is striking [emphasis added].*

All Amounts Due and Payable if Breach Occurs: If the Apprentice breaches this Agreement, all amounts due and owing on the Scholarship Loan . . . will become immediately due and payable

The strike and the refusal to process applications

On September 29, 2003, the Union struck SimplexGrinnell.³ By letter of October 29, 2003, the JATC director notified SimplexGrinnell's vice president that JATC would not process any applications from SimplexGrinnell seeking to enroll new apprentices in the program, would not require apprentices who left SimplexGrinnell to return to SimplexGrinnell, and would not approve temporary journeyman status for SimplexGrinnell apprentices. Since that date, the JATC has not processed new apprenticeship applications submitted by SimplexGrinnell. The Region has determined that SimplexGrinnell apprentices who are already in the program continue to progress through the normal process. However, the JATC did not approve temporary journeyman status for certain SimplexGrinnell apprentices because they were not members of the Union.

ACTION

We conclude that the JATC violated Section 8(a)(1) by requiring applicants to agree as a condition of accepting the scholarship loan that they would not work for an employer involved in a strike with an affiliated local; and by refusing to accept applicants into the program to work for a struck employer. However, the evidence fails to demonstrate that the JATC failed to move the apprentices through the program because the apprentices were working for a struck employer.

First, we agree with the Region that the JATC, a conceded statutory employer, was in a position of sufficient control over the applicants' and apprentices' terms and conditions of employment to be able to restrain or coerce these employees in violation of Section 8(a)(1).⁴

³ SimplexGrinnell continued to make payments into the Education Fund and to participate in the apprenticeship program.

⁴ See Fabric Services, Inc., 190 NLRB 540, 542 (1971)(statutory employer, by virtue of its ownership of the property and its power to evict contractor's employee from its premises, was in a position of sufficient control effectively to enforce its direction to the employee either to remove his union pocket protector or get off its property, in violation of Section 8(a)(1)); A.M. Steigerwald Co., 236 NLRB 1512, 1515 (1978)(credit union

The JATC created the Scholarship Loan Agreement and operates the apprenticeship program, which includes control over which applicants are accepted into, and promoted through, the program. We further agree with the Region that it should not also proceed against the Education Fund based on its control over the JATC. Inasmuch as the JATC controls the apprenticeship program and is directly responsible for the unlawful conduct, it is unnecessary to decide whether the Education Fund is jointly liable for the JATC violations.

Section 7 of the Act guarantees to all employees the right to refrain from participation in union activities, including strikes.⁵ Employees also have a Section 7 right "not to declare their support or nonsupport for a strike."⁶ Further, an employer may not condition a job or benefit on an employee's cessation a Section 7-protected activity.⁷

violated Section 8(a)(1) by maintaining discriminatory bylaws that only admitted employers whose employees were not unionized, and by threatening employees in its letter with denial of credit union participation of they chose the union).

⁵ Big Horn Coal Co., 309 NLRB 255, 258 (1992). See also Local 81 (MacDonald Meat), 284 NLRB 1084 (1987)(union violated Section 8(b)(1)(A) by maintaining strike agreements that restrained members' rights to resign and nonmembers' rights to refrain from participation in the strike).

⁶ Freeman Decorating Co., 336 NLRB 1, 10 (2001); Conoco, Inc., 265 NLRB 819, 820 (1982), citing Emerson Electric Co., 246 NLRB 1143 (1979), enfd. in rel. part, 650 F.2d 463 (3rd Cir. 1981), cert. den. 102 S.Ct. 1429 (disabled employees had Section 7 right to refrain from declaring their position on a strike while they were medically excused, and employer could not require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits).

⁷ Cirker's Moving & Storage Co., 313 NLRB 1318, 1325-1326, 1327-1328 (1994)(employer unlawfully conditioned employee's return to work, and offered four weeks additional pay, on his relinquishing his right to act as shop steward. Such conduct places an employee in the position of having to

In particular, an employer may not grant or deny a benefit based on whether an employee exercised the Section 7 right to strike.⁸ Likewise, it is unlawful to condition a job or benefit on an employee's agreement to refrain from participating in a strike.⁹

make a coerced choice between foregoing his employment or foregoing his Section 7 rights); Mandel Security Bureau, 202 NLRB 117, 119-120 (1973)(employer unlawfully conditioned employee's reinstatement to particular job assignment on ceasing concerted activities and withdrawing Board charges); Resco Products, Inc., 331 NLRB 1546, 1550 (2000)(successor's right to set initial terms of employment did not include right to require, as an employment condition, that employees give up accrued contractual rights, or other rights protected by the Act, against the predecessor. Such a holding would be "fundamentally inconsistent with principle that an employer may not condition employment, or continued employment, on the waiver of statutory rights or on the abandonment of a grievance").

⁸ See Aero-Motive Mfg. Co., 195 NLRB 790, 791 (1972) (depriving strikers of benefits granted to nonstrikers or making threats or promises of benefit to induce employees to abandon the strike, violate the Act); Schenk Packing Co., 301 NLRB 487, 489 (1991)(employer unlawfully induced employees to abandon strike by announcing before a lockout the condition that no union members would be employed as replacements and that locked-out union members might be reinstated only if they revoked their union membership; and by granting employees who resigned from the union and returned to work a bonus and vacation package one week into the five week lockout); Boise Cascade Corp., 304 NLRB 94, 95-96 (1991)(employer violated Section 8(a)(1) by granting free weekend gift certificates to non-striking employees that it deprived to striking employees merely because they chose to strike).

⁹ Unlawful coercion of employees with respect to the right to refrain from participating in a strike generally occurs in the context of Section 8(b)(1)(A) violations. See, e.g., UMW (Canterbury Coal Co.), 305 NLRB 516, 519 (1991) (holding members to contractual commitment to repay benefits they receive on their return to work unlawfully penalizes those employees who exercise their rights to

In the instant case, we conclude that the JATC Scholarship Loan Agreement violates Section 8(a)(1) because it expressly conditions an applicant's receipt of a scholarship loan on an agreement to refrain from participating in a strike. Thus, the Agreement contains a provision requiring apprentices to warrant that "as a condition of receiving the Scholarship Loan, he will neither seek, continue, nor accept employment from an employer involved in a strike with a local affiliated with the [Union]." Another provision states that it "will constitute an immediate breach of this Agreement" if the apprentice "is employed by, continues employment with, or becomes an employer against which any affiliated local union of the United Association is striking." By explicitly conditioning accepting a scholarship loan on an applicant's agreement not to work for an employer involved in a strike, the Scholarship Loan Agreement clearly tends to interfere with employees' Section 7 right not to engage in a strike.

We would reject any claim that the provision is a lawful waiver of a Section 7 right in return for a significant benefit - a scholarship. A waiver of a statutory right, including the right to refrain from engaging in a strike, will be narrowly construed. The waiver must be clear and unmistakable, and the employee should understand that he is waiving that right.¹⁰ The waiver also must have a legitimate, lawful purpose and be "narrowly drawn to fit the situation and designed to be prophylactic".¹¹ For example, the Board in certain circumstances has permitted an employer to condition its reduction of a legitimate penalty (in response to unprotected activity) on the employee's agreement to waive

refrain from striking and return to work after resigning from the union); Sheet Metal Workers' International Association, Local Union No. 9 (Concord Metal Inc.), 297 NLRB 86, 88 (1989) (the express statutory rights to resign from a union and to refrain from participating in a strike override any common law contractual requirements engendered by executing a strike agreement).

¹⁰ Bethenergy Mines, Inc., 308 NLRB 1242, 1245 (1992), citing Metropolitan Edison Co. v. NLRB, 46 U.S. 693 (1983); Sheet Metal Workers' Intl. Assn. Local 9, 297 NLRB at 90.

¹¹ Bethenergy Mines, Inc., 308 NLRB at 1245.

a Section 7 right.¹² Here, there is no indication that the applicants understood that they were waiving a statutory right when they signed the loan agreement. Further, the condition in the Scholarship Loan Agreement that applicants waive their Section 7 right has no legitimate, narrowly drawn purpose. Rather, its only purpose appears to be unlawful, i.e., to restrain employees from exercising their statutory right to refrain from supporting a strike.¹³

¹² See Ibid. (employees engaged in unprotected, unauthorized work stoppage and extended this misconduct by picketing an unrelated employer; "last chance agreement" by which employees agreed to refrain from holding union positions that required them to deal with management for the duration of the contract, in return for employer agreement not to discharge the employees was a "condition narrowly drawn to fit the situation and designed to be prophylactic"); U.S. Postal Service, 234 NLRB 820, 821 (1978)(employer lawfully conditioned reduction in legitimate discipline on employee's promise not to grieve suspension). Compare Cirker's Moving & Storage Co., 313 NLRB at 1326 (employer's offer to return employee to work and give him four weeks pay if he would leave his union steward position not a condition narrowly drawn to fit the situation and designed to be prophylactic).

¹³ Cases holding that a union may waive unit employees' right to strike are not analogous, since those waivers are permissible only as a legitimate quid pro quo for the employer's acceptance of contract provisions that benefit the entire bargaining unit. See, e.g., NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974)(union may waive right to strike during time of agreement as quid pro quo of employer's acceptance of grievance and arbitration procedure, but it may not waive employees' right to distribute literature on the premises); NLRB v. Mid-States Metal Products, Inc., 404 F.2d 702, 705 (5th Cir. 1968)(where union and employee interests are one it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees). See also Sheet Metal Workers' Intl. Assn. Local 9, 297 NLRB at 89, citing Sheet Metal Workers Local 29 (Metal-Fab), 222 NLRB 1156, 1160 (1976)(even a clear and unmistakable waiver will not be permitted, where the union has an apparent self-interest in perpetuating itself).

We further conclude that the JATC has unlawfully refused to accept new apprenticeship applications from SimplexGrinnell because the applicants are exercising their Section 7 right to refrain from participating in the strike. In general, limitations on employment opportunities based on an employee's union-related activities are unlawful. Thus, a union hiring hall rule that accords individuals preference in employment based on union considerations violates Section 8(b)(1)(A) and 8(b)(2).¹⁴ Similarly, we conclude, an employer rule which conditions acceptance to an apprenticeship program based on the applicant's union-related activities, or lack thereof, also unlawfully discriminates along Section 7 lines. The JATC exercises exclusive control over the apprentice application process, much as a union exerts control over referrals made by an exclusive union hiring hall. Moreover, the JATC discriminatorily operated the apprenticeship application process with respect to SimplexGrinnell employees. Since October 2003, the JATC has accepted and processed applications from employees who have chosen to honor the strike, and rejected applications from SimplexGrinnell employees who have not honored the strike. Since the JATC controls the application process, its refusal to admit the SimplexGrinnell applicants has effectively prevented them from joining the program. Such a discriminatory basis for rejecting otherwise qualified applicants has the clear tendency to encourage union membership. By thus excluding applicants on the basis of their refusal to support the strike, the JATC has discriminated, restrained, and coerced employees in the exercise of rights guaranteed by Section 7.¹⁵

¹⁴ See IATSE Local 659, 197 NLRB 1187, 1189 (1972)(union restrained and coerced employees in the exercise of rights guaranteed in Section 7 by maintaining a referral roster that excluded employees who had not previously worked in a unit covered by a collective-bargaining contract to which union was a party); Seafarers International Union, 244 NLRB 641 (1979)(union's exclusive hiring hall arrangement unlawfully encouraged union membership by granting job-referral seniority based upon work experience for signatory employers only).

¹⁵ As noted, however, the evidence indicates the JATC has continued to advance through the steps of the program non-striking SimplexGrinnell apprentices already in the program.

Accordingly, the Region should issue complaint, absent settlement, alleging that the JATC violated Section 8(a)(1) by conditioning applicants' receipt of a scholarship on their agreement to refrain from engaging in a strike and by refusing to process applications for SimplexGrinnell apprentices.

B.J.K.